90-370

(1)

No. ____________

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

REPUBLIC NATIONAL BANK OF MIAMI,
Petitioner,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under Rule 3(c) of the Federal Rules of Appellate Procedure, a supersedeas bond filed with a stipulation in which Appellant stated it was not then appealing constitutes a notice of appeal or its functional equivalent?

2. Whether a bank which issues a commercial letter of credit to finance the purchase of goods acts unreasonably, as a matter of law, in relying upon the documents of title and the underlying goods as collateral in the transaction?

3. Whether a standard bankers blanket bond — which provides coverage for loss resulting directly from the bank's having in good faith acquired, or given value, extended credit, or assumed liability, on the faith of, or otherwise acted upon, any original forged bill of lading — insures a bank against a loss sustained from honoring a letter of credit after presentation of original forged bills of lading held by the bank as collateral?

PARTIES TO THE PROCEEDING

Petitioner: Republic National Bank of Miami, a national banking association.*

Respondent: Fidelity and Deposit Company of Maryland, a Maryland corporation.**

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* Pursuant to Sup. Ct. R. 29.1, Republic is a wholly owned subsidiary of Republic Banking Corporation of Florida, a Florida corporation. There are no non-wholly owned subsidiaries of Republic.

** Republic is not aware of any parent or non-wholly owned subsidiaries of Fidelity and Deposit Company of Maryland.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Republic National Bank of Miami ("Republic") hereby petitions for a writ of certiorari and requests that this Court grant the petition, vacate the judgment of the court of appeals and reinstate the judgment entered by the district court in favor of Republic and against Fidelity and Deposit Company of Maryland ("F&D").

REFERENCE TO OPINION BELOW

The opinion of the court of appeals is reported as Republic National Bank of Miami, a national banking association, Plaintiff-Appellee, v. Fidelity and Deposit Company of Maryland, a Maryland Corporation, Defendant-Appellant, consolidated Case Nos. 87-6034 and 88-5185, 894 F.2d 1255 (11th Cir. 1990), and is reproduced in the Appendix to this Petition at pages A-1-21. The order of the court of appeals

the letter of credit. The presentation of the forged bills of lading triggered Republic's decision to pay $1,239,000.00. Thus, Republic gave value "on the faith of" the forged bills. Republic's loss continued to be caused by the forged bills of lading because when Republic resorted to the bills to locate the 6,000 bags of Colombian coffee held as collateral, no coffee existed. Republic's loss therefore comes within Insuring Agreement (E) of the bond. *See American Ins. Co. v. First Nat'l Bank in St. Louis*, 409 F.2d 1387 (8th Cir. 1969).

A-37-38 (brackets added).

On September 29, 1987, the district court entered final judgment. A-40-41. Because the judgment recited post-judgment interest at an incorrect rate, F&D filed a motion, purportedly under Fed.R.Civ.P. 59(e), to alter or amend the judgment by deleting the reference to post-judgment interest. A-58-60. On October 13, 1987, F&D filed a supersedeas bond and a stipulation in which F&D stated that because the post-judgment motion was pending, F&D was not then appealing. A-61-63; 64-65.

On October 16, 1987, the district court entered an order granting F&D's motion by deleting the sentence concerning post-judgment interest. A-42-43. On October 28, 1987, the court also entered an amended final judgment which deleted the reference to post-judgment interest. A-44-45. On November 19, 1987, F&D filed its first notice of appeal. A-66-67. Thereafter, the district court, following a hearing, entered an order awarding attorney's fees to Republic. Republic moved for partial reconsideration, which was denied on February 8, 1988. F&D filed a second notice of appeal on February 26, 1988. A-68-69.

Republic moved to dismiss the appeal on the grounds that both notices of appeal were untimely. The Eleventh Circuit ruled that F&D's post-judgment motion was not an authorized Rule 59(e) motion, did not toll the time for appeal, and therefore the first notice of appeal was untimely. However, the court treated the supersedeas bond as the

equivalent of a notice of appeal and denied Republic's motion to dismiss the appeal, impliedly rejecting Republic's argument that the supersedeas bond was not equal to a notice of appeal because when F&D filed the bond, it indicated by stipulation that it did not intend to effect an appeal at that time. A-22-23.

In a sharply divided decision on the merits, the Eleventh Circuit reversed 2-1. Judge Tjoflat, writing for the majority, held that no bank can, as a matter of law, reasonably rely on documents of title as collateral to finance its customer's purchase of goods under a commercial letter of credit. The majority asserted that a letter of credit transaction is so inherently untrustworthy that no party — buyer, seller or bank — can reasonably expect nor require good faith performance from the other, and therefore "the bank . . . has no guarantee that these documents [of title] will be genuine, nor is it entitled to one." A-15 (brackets added). Thus, according to the majority, when a bank relies on documents of title, the bank acts unreasonably as a matter of law as such reliance "is no more than a bet on the roll of the dice."[1] A-15.

The majority also concluded that the bankers blanket bond did not cover the bank's loss. The court focused on a provision in the bond requiring the bank to have possession of original documents of title as a condition precedent to relying or acting on the documents and concluded that the bank must have possession of the forged collateral document when it makes the credit decision. Possession of the forged document prior to advancing the funds was irrelevant to the court. Since a bank issuing a letter of credit payable only on presentation of bills of lading can never have the bills before issuance of the letter of credit, the majority concluded that the bond does not insure a letter of credit/bill of lading loss. A-14.

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[1] As discussed *infra*, as of September 1989 there were in excess of 31 billion dollars in outstanding commercial letters of credit financed by commercial banks in the United States where such reliance occurs.

In a vigorous dissent, Senior Circuit Judge John R. Brown characterized the decision as startling. He observed that the majority's declaration — that in a letter of credit transaction the bank has no guarantee that the bills of lading are genuine, nor is the bank entitled to one — is contrary to fundamental principles of commerce, where parties depend upon each other's good faith. A-17-19.

Judge Brown also noted that the majority misread the bond to require the bank to have possession of the forged documents of title when it issues the letter of credit. Judge Brown, agreeing with the trial court, concluded that because the bank had possession of the original forged bills of lading *before* it honored the letter of credit, and the receipt of the bills of lading triggered payment under the letter of credit, Clause (E) of the bond covered the loss. A-19-21.

REASONS FOR GRANTING THE WRIT

This Petition raises three issues. The first involves an issue of appellate jurisdiction. The other two involve commercial issues that significantly impact commerce.

This Court has never addressed the important jurisdictional issue presented: what criteria should determine whether a collateral document constitutes a notice of appeal or its functional equivalent? Decisions of the circuit courts directly conflict on this issue. This case presents the Court the opportunity to resolve the conflicts among the circuits and announce guiding principles.

The adverse impact on commerce created by the decision below is so far-reaching as to warrant this Court's review of the commercial issue presented: whether banks act unreasonably, as a matter of law, in relying on documents of title as collateral to finance the purchase of goods under commercial letters of credit. The decision departs from centuries of accepted banking practice in holding that documents of title are unworthy of reliance in financing trade. The decision contravenes important federal statutes and the Uniform Commercial Code as adopted by every state, and conflicts

with decisions of this Court and other circuit courts, all of which recognize the reasonableness of and encourage such bank reliance.

This Petition also raises a third issue inextricably tied to the second question: whether the standard bankers blanket bond insures a bank against a loss sustained from honoring a letter of credit when presented with documents of title which turn out to be forged. Because secured letter of credit financing is indispensable to domestic and international commerce, and because banks must rely on the facial validity of the documents of title, banks must be able to insure against the risk of forgery. Clause (E) of the bankers blanket bond — a standard provision throughout the industry — explicitly provides such protection. The circuit court's contrary interpretation and reasoning is antithetical to standard banking practice and expectations. This Court should therefore grant certiorari on these important questions to preserve the ability and willingness of banks to provide secured letter of credit financing.

I. THE CIRCUITS ARE IN CONFLICT IN DECIDING WHAT TYPES OF DOCUMENTS CONSTITUTE THE FUNCTIONAL EQUIVALENT OF A NOTICE OF APPEAL

A. F&D's Notices of Appeal Were Untimely

The Eleventh Circuit correctly determined that F&D's two notices of appeal were untimely. However, the court erred in treating the supersedeas bond as a notice of appeal because F&D's stipulation, filed with the bond, clearly stated that F&D was not then appealing the final judgment. The stipulation clearly expressed F&D's intention to appeal at some future date. Therefore, the bond was not a notice of appeal or its functional equivalent, and the appellate court had no jurisdiction to decide the appeal.[2]

[2] Because F&D's motion to delete a sentence concerning post-judgment interest from the final judgment did not seek "reconsideration of matters properly encompassed in a decision on the

B. Compliance with Rules 3(c) and 4(a)(1) is Mandatory and Jurisdictional

Fed.R.App.P. 3 and 4 require that a party file a sufficient notice of appeal within 30 days after the date of entry of judgment. Compliance with these rules is both mandatory and jurisdictional. The appellate court may not waive compliance with these requirements. If a party fails timely to file a proper notice of appeal, the appellate court lacks jurisdiction and must dismiss the appeal. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988); *United States v. Robinson*, 361 U.S. 220 (1960).

Fed.R.App.P. 3(c) provides:

> **Content of the Notice of Appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

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merits," *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451 (1982), *Buchanan v. Stanships, Inc.*, 485 U.S. 265 (1988), the motion did not toll the time for appeal. F&D's first notice of appeal, filed over 50 days after entry of the judgment, was therefore untimely. Moreover, even if F&D's post-judgment motion were a Rule 59(e) motion, its notice of appeal was due within 30 days of entry of the order granting the motion, Fed.R.App. P. 4(a)(4), *i.e.*, by November 15, 1987. F&D's notice of appeal filed November 19, 1987 was similarly untimely. Nor was the time to appeal to be measured from the amended final judgment, which changed nothing of substance in the final judgment and did not affect any issues on appeal. *See FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952).

F&D's second notice of appeal, filed February 26, 1988, appealing the order awarding attorney's fees, was not effective nor timely to appeal the final judgment entered September 29, 1987. *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196 (1988) (district court's retention of jurisdiction to award attorney's fees does not affect finality of judgment for purposes of appeal).

In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), this Court held that the failure to file a notice of appeal in accordance with the specificity requirements of Rule 3(c) constitutes a jurisdictional bar to the appeal. In concluding that a notice of appeal which omitted a party's name did not comply with Rule 3(c), this Court recognized that a party may file a document which "is the functional equivalent of what the rule requires." 487 U.S. at 317, citing *Houston v. Lack*, 487 U.S. 266 (1988). However, this Court in *Torres* concluded that the petitioner had not filed the functional equivalent of a notice of appeal, as the term "et al." failed to give notice with *certainty* that the unnamed petitioner was appealing. 487 U.S. at 317-18.

The Court in *Torres* did not delineate the criteria for determining in a particular case whether a document qualifies as a notice of appeal. However, this Court has consistently emphasized the need for and has adopted bright-line rules producing certainty, consistency and predictability in determining appellate jurisdiction. *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 267 (1978); *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202-203 (1988); *Houston v. Lack*, 487 U.S. 266, 275 (1988); *Osterneck v. Ernst & Whinney*, 489 U.S. 169, __ n.3, 109 S. Ct. 987, 992 n.3 (1989).

In *Houston*, this Court stressed the need for certainty in determining appellate jurisdiction. 487 U.S. at 275. Even the dissenting opinion, joined by four justices, agreed that uniformity and certainty in interpreting the appellate rules on jurisdiction was necessary:

> If the need for a uniform meaning is apparent even with respect to ordinary statutory deadlines, and indeed even with respect to court-created rules that can be amended at the judges' discretion, it is even more apparent when a statutory deadline bearing upon the very jurisdiction of the courts is at issue. *In that context, allowing courts to give different meanings from case to case allows them to expand and contract the scope of their own competence. That this is not envisioned is plain (if any*

citation is needed) from Rule 26(b) of the Federal Rules of Appellate Procedure . . . .

487 U.S. at 279 (emphasis added).

C. The Circuits Conflict on what Constitutes the Functional Equivalent of a Notice of Appeal

According to Professor Moore, "since a notice of appeal may be the simplest instrument known to federal procedure, and the directions for filing are abundantly clear, the rule does not appear calculated to produce much confusion." 9 J. Moore, B. Ward, and J. Lucas, *Moore's Federal Practice and Procedure* ¶ 203.09 at 3-37 (2d ed. 1990). However, as discussed below, there is considerable conflict and confusion among the circuit courts on what constitutes the functional equivalent of a Rule 3(c) notice.

Some courts require that a party intend that the collateral document signify the start of an appeal, while the Eleventh Circuit does not require such intent. Some courts hold that a collateral document which by its terms is inconsistent or ambiguous concerning the intent to appeal is not a valid substitute for a Rule 3(c) notice, while other courts permit such documents to qualify. Some courts hold that a document which contains the recitals of Rule 3(c) but does not purport to be a notice of appeal is not a sufficient Rule 3(c) notice, while others hold that such a document is acceptable. These disparate approaches have lead to totally irreconcilable results. The absence of guiding principles has allowed the circuits "to give different meanings from case to case . . . [and] to expand and contract the scope of their own competence," *Houston, supra*, 487 U.S. at 279 (Scalia, J., dissenting) (brackets added), contrary to the appellate rules of procedure.

In this case, F&D filed a stipulation, with its supersedeas bond, seeking a stay of execution and approval of the bond. The stipulation provided that since F&D's motion to alter the judgment was pending, the court should grant "a stay pending any ensuing appeal" as F&D "cannot now appeal." A-62.

The stipulation further provided that the bond would protect Republic "until the appeal, which F&D intends to file in this matter, is either dismissed or affirmed." A-62. The stipulation makes it clear that when F&D filed the bond, F&D was not then appealing. Despite F&D's expressed intent that it was not then appealing, the Eleventh Circuit treated the bond as a notice of appeal.

The Eleventh Circuit's ruling conflicts with *Cel-A-Pak v. California Agric. Labor Relations Bd.*, 680 F.2d 664 (9th Cir.), *cert. denied*, 459 U.S. 1071 (1982). There, the notice of appeal was untimely. However, during the time to appeal, the appellant filed a motion for injunction pending appeal and for rehearing to alter the judgment. Appellant conceded that when he filed the document, he did not intend to appeal nor intend the document be treated as a notice of appeal. Based on this intent, the Ninth Circuit refused to treat the document as a notice of appeal:

> The document filed by appellant and counsel's statements regarding it evince a desire to have the district court retain jurisdiction and alter its judgment rather than a desire to effectively take an appeal and thus terminate the district court's jurisdiction.

680 F.2d at 668.

The Eleventh Circuit's rationale also conflicts with the Tenth Circuit's decisions in *Martinez v. Sullivan*, 874 F.2d 751 (10th Cir. 1989), and *Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563 (10th Cir.), *cert. dismissed*, 444 U.S. 987 (1979). In both cases, appellants filed premature notices of appeal. Within the time to appeal, however, appellants filed collateral documents (in *Martinez*, a letter, in *Montgomery*, a motion to stay injunction pending appeal). The Tenth Circuit refused to treat these documents as notices of appeal because the appellants believed, though mistakenly, that they had

already appealed and did not intend the collateral documents to serve as notices of appeal.[3]

F&D filed a supersedeas bond and a stipulation renouncing the bond as a notice of appeal. In deciding whether similar documents can be the functional equivalent of a notice of appeal, the circuit courts are in conflict. *Washington v. Patlis*, 868 F.2d 172 (5th Cir. 1989) (*pro se* motion to reconsider or alternatively notice of intent to appeal does not constitute functional equivalent of notice of appeal); *United States v. Cooper*, 876 F.2d 1192 (5th Cir. 1989) (*pro se* motion for rehearing and notice of appeal does not constitute functional equivalent of notice of appeal); *contra Bradley v. Coughlin*, 671 F.2d 686 (2d Cir. 1982) (*pro se* motion to reconsider or alternatively for leave to appeal constitutes the functional equivalent of a notice of appeal).

The circuits are also in conflict on the issue whether a notice of appeal may be satisfied by a document which, although it contains the recitals of Rule 3(c), does not purport to be a notice of appeal. *Frace v. Russell*, 341 F.2d 901 (3d Cir.), *cert. denied*, 382 U.S. 863 (1965) (appellate brief constitutes notice of appeal); *contra United States v. Cooper*, 876 F.2d 1192 (5th Cir. 1989) (appellate brief will not constitute a notice of appeal even if it meets the requirements of Rules 3 and 4; to construe the brief as a notice of appeal would eliminate entirely the requirement under Rule 3 for the filing of a notice of appeal).[4]

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[3] The Eleventh Circuit's order treating the supersedeas bond as a notice of appeal cites *Stallworth v. Shuler*, 758 F.2d 1409 (11th Cir. 1985), which in turn relies upon *O'Neal v. United States*, 272 F.2d 412 (5th Cir. 1959), a decision this Court has characterized as "a liberal view of papers filed by indigent and incarcerated defendants. . . ." *Coppedge v. United States*, 369 U.S. 438 at 442 n.5 (1962).

[4] *See also* and *compare Hollywood v. City of Santa Maria*, 886 F.2d 1228 (9th Cir. 1989) (motion for stay pending appeal does *not* constitute notice of appeal because lenient standard does not apply to a party represented by counsel) *with Dura Systems, Inc. v. Rothbury Inv., Ltd.*, 886 F.2d 551 (3d Cir. 1989), *cert. denied*, 110

There are circuit court decisions which actually turn on the arrangement of the words in the collateral document in determining whether the document "clearly evinces" an intent to appeal. *Compare Mosley v. Cozby*, 813 F.2d 659 (5th Cir. 1987) (motion to reconsider judgment or alternatively for leave to appeal *in forma pauperis* did *not* clearly evince intent to appeal) *with Buffalo v. Sunn*, 854 F.2d 1158 (9th Cir. 1988) (state's notice of appeal providing that the state hereby appeals *unless* district court reconsiders its order clearly evinced the state's intent to appeal). The *Buffalo* court, recognizing the apparent conflict with *Mosley*, offered the following "distinction":

> Whereas an appeal was sought in *Mosley only in* the event that reconsideration by the district court was denied, an appeal was intended in this case *unless* reconsideration was granted.

Id. at 1161 (emphasis in original). Such artificial "distinctions," seizing upon the fortuitous sentence structure of the document, should have no place in determining appellate jurisdiction.

This Court has recognized that the "filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 at 58 (1982). The function of a notice of appeal is to notify the court and opposing party that appellant is taking an appeal *at the time of filing the notice*, not that a party may appeal sometime in the future. The very words required by Rule 3(c) speak in the present tense: "The notice of appeal shall specify the party . . . *taking the appeal;* shall designate the judgment . . . *appealed from*; and shall name the court to which the appeal *is taken*." (emphasis added). The suggested

S.Ct. 844 (1990) (order granting stay of judgment constitutes functional equivalent of notice of appeal).

form does as well: "Notice is hereby given that [appellant] hereby appeals. . . ."[5]

Although Rule 3(c) forgives "informality of form or title of the notice of appeal," the rule still requires appellant to file a document by which appellant intends to effect an appeal. F&D did not timely file any such document. "Informality of form or title" is not a license to an appellate court to treat a document, contrary to appellant's own statement that it was not then appealing, as a notice of appeal.

If under *Torres* a party must specify clearly *who* is appealing, that party should also be required to specify clearly *when* it is appealing. To comply with Rule 3(c), a party should unequivocally intend to appeal when it files the collateral document and should intend the document to mark the beginning of an appeal. A collateral document renounced by appellant in an accompanying stipulation as a notice of appeal is the exact opposite of the function and objective of a valid notice of appeal. This Court should therefore grant certiorari to resolve the conflicts among the circuits on this important jurisdictional issue.

II. BANKS HAVE THE RIGHT TO RELY ON DOCUMENTS OF TITLE TO FINANCE THE PURCHASE OF GOODS UNDER A COMMERCIAL LETTER OF CREDIT

The circuit court's majority decision that no bank may, as a matter of law, reasonably rely on documents of title to finance the purchase of goods under a commercial letter of credit conflicts with important federal legislation and clashes with long standing legal principles enunciated by this Court and other circuit courts. In holding that secured letter of credit financing is unsound, the decision below threatens a

[5] This Court in *Griggs* impliedly rejected the argument that various collateral documents filed in that case constituted a sufficient notice of appeal. *See Griggs*, 459 U.S. 56 at 62-66 (Marshall, J., dissenting).

source of bank financing which, as of September 1989, exceeded $31 billion in the United States.[6]

Secured Letter of Credit Financing

The paramount function of a commercial letter of credit is to finance the sale of goods. In such transactions, it is standard practice for the issuing bank to rely on the documents of title as well as the underlying goods as collateral.[7] In a typical secured letter of credit financing transaction, the issuing bank agrees with its customer (the buyer of the goods) to advance funds to the beneficiary (the seller) by honoring the letter of credit. The bank's payment to the seller under the letter of credit creates a loan to the customer-buyer. As collateral for this loan, the customer pledges to the bank the original documents of title presented by the seller-beneficiary. Because the documents of title are negotiable instruments that control the goods, the bank is secured by possession of the documents. If the customer defaults on the loan, the bank may claim the goods and sell them to satisfy the debt. Secured letter of credit financing thus provides buyers with purchase money to conduct trade while at the same time protects banks which are secured by the pledged documents of title and the goods. *See Consolidated Aluminum Corp. v. Bank of Va.*, 544 F. Supp. 386 at 394 (D. Md. 1982), *aff'd*, 704 F.2d 136 (4th Cir. 1983); H. Harfield, *Bank Credits and Acceptances* 27, 59-74 (4th ed. 1958); B. McCullough, *Letters of Credit* § 3.10[3] at 3-99 (1990); 7 R. Anderson, *Uniform Commercial Code* § 5-114:23 at 342 (3d ed. 1985).

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[6] According to the Federal Reserve Bank in Atlanta, the $31 billion amount excludes letters of credit purchased by the bank's customers by paying cash or its equivalent to the issuing bank at the time it issues the letter of credit.

[7] B. McCullough, *Letters of Credit* § 3.10[3] at 3-99 (1990): "In the letter of credit transaction, the documents of title presented by the beneficiary to the issuer, and the goods covered by the documents of title, most often constitute the collateral for the account party's obligation to reimburse the issuer." *Id.* (footnotes omitted).

Henry Harfield, the dean of letter of credit law and practice, describes the financing function of a commercial letter of credit as follows:

> The commercial letter of credit also has certain advantages for the buyer. It may afford him a means of using his purchase as security for obtaining credit necessary to finance the transaction. A documentary commercial letter of credit is automatically self-securing because the [issuing] bank's credit or funds are placed at the disposal of the beneficiary in exchange for negotiable shipping documents that convey control of the merchandise. For this reason the [issuing] bank may be willing to issue such a letter of credit for a buyer to whom it would not willingly make a loan for an equivalent amount without security.

H. Harfield, *Bank Credits and Acceptances* 27 (4th ed. 1958) (brackets added). Another noted letter of credit commentator, Professor Boris Kozolchyk, similarly observes:

> Although bankers' security extends to a number of documents, ... the bill of lading will be singled out as the main subject for analysis. This is because the bill of lading is a pivotal instrument for bankers' security in documentary credits ....

B. Kozolchyk, *Commercial Letters of Credit in the Americas* § 4.04[2] (1966).[8]

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[8] A commercial letter of credit finances the sale-of-goods transaction and guaranties payment. It is to be distinguished from standby letters of credit, which do not usually involve the sale of goods and guaranty performance by the account party. *See* Verkuil, *Bank Solvency and Guaranty Letters of Credit*, 25 Stan.L.Rev. 716, 721 (1973). Commercial letters of credit are considered secured lending; standbys are not. *See id.* Verkuil notes that in 1971 "the bulk of our approximately $40 billion of annual imports [was] financed by letters of credit." *Id.* at 716 (brackets added).

A. The Decision Below Conflicts with Federal Legislation which Encourages Banks to Rely on Documents of Title as Collateral

The majority decision of the circuit court declared this method of secured financing unreasonable as a matter of law. It held that documents of title and the goods they control are inherently untrustworthy and that banks cannot rely on their validity because such reliance is "no more than a bet on the roll of the dice." A-15. This holding is in direct conflict with federal statutory law and is inimical to commerce.[9]

In 1916 Congress enacted the Federal Bill of Lading Act, 49 U.S.C. §§ 81 *et seq.* (1916), to preserve the integrity of bills of lading. The purpose of the Act was to ensure that banks did not have to "roll the dice" in relying on documents of title and to encourage banks to so rely. Noting that banks annually advanced over $5,000,000,000 on bills of lading as collateral, Senator Pomerene's report concluded that it "must follow, therefore, that any reasonable legislation which will lead to the security of these bills of lading in the hands of their owners or holders must be of immense value to the commerce of the country." S. Rep. No. 149, 64th Cong., 1st Sess. 2 (1916). *See also* H.R. Rep. No. 847, 64th Cong., 1st Sess. 2-3 (1916). In response,

> [T]he Federal Bill of Lading Act was passed to eliminate opportunities of irregularity and fraud with regard to the

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[9] The majority decision appears to have relied on certain dicta in *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426 (1986), in which this Court addressed the sole issue whether a standby letter of credit backed by a contingent promissory note constituted an insured FDIC deposit. The court below apparently read a single sentence in the opinion — that in a commercial letter of credit, the customer would "typically" pledge funds to the bank when it issues the letter of credit, 476 U.S. at 440 — as precluding any other forms of collateral arrangements, such as secured letter of credit financing. This interpretation of *Philadelphia Gear* is wholly unjustified, as the case had nothing to do with commercial letters of credit — indeed this Court distinguished commercial credits from standby's, *id.* at 428 — and this Court certainly was not declaring bank reliance on documents of title unreasonable as a matter of law. *See supra* nn. 6-8.

issuance of such bills [of lading], so as to encourage the advance of money to businesses by banks, with the bills as security. If banks could depend on the integrity of bills of lading, they could loan money on such instruments without fear of loss.

United States v. Castro, 837 F.2d 441, 444 (11th Cir. 1988) (brackets added).[10]

The holding below that banks can not rely on documents of title is directly contrary to the purpose of the Federal Bill of Lading Act, and the court's conclusion that "the bank . . . has no guarantee that these documents [of title] are genuine, nor is it entitled to one" is inconsistent with 49 U.S.C. § 114(a), by which the beneficiary guaranties to the issuing bank the genuineness of the documents of title.[11] *See also* 49 U.S.C. § 116 (recognizing mortgagee holding bills of lading as security); § 119 (providing for the rights of a bona fide purchaser as against unpaid seller); § 122 (defining "purchase" as including taking by mortgage or pledge).

Congress again recognized the importance of bank reliance on bills of lading as collateral in financing international trade by enacting the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1300 *et seq.* (1936). One of the purposes of COGSA was to preserve the integrity of, and promote bank reliance on, bills of lading in foreign trade. *See Spanish-American Skin Co. v. M. S. Ferngulf*, 143 F.Supp. 345

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[10] In *Castro*, the Eleventh Circuit affirmed Duque's conviction for pledging false bills of lading in violation of the Federal Bill of Lading Act. Thus, the Eleventh Circuit has issued two decisions on the Duque bill of lading fraud: one noting that Congress passed a federal statute to preserve the integrity of bills of lading and to encourage banks to rely on them as collateral; and the decision in this case, holding that documents of title are not worthy of bank reliance and cannot be relied upon as a matter of law.

[11] The panel's reasoning speculating that the goods "could" be defective cannot justify declaring reliance on bills of lading unreasonable. The beneficiary warrants to the issuing bank, under 49 U.S.C. § 114(d), that the goods are conforming. In the vast majority of letter of credit transactions, the goods conform.

(S.D.N.Y. 1956), *aff'd*, 242 F.2d 551 (2d Cir. 1957); 46 U.S.C. § 1303(4) (bills of lading are *prima facie* evidence of the information specified in them).[12]

B. The Decision Below Conflicts with the Principles Stated by this Court in *United States v. Ferger*, 250 U.S. 199 (1919), *Decatur Bank v. St. Louis Bank*, 88 U.S. (21 Wall.) 294 (1875), and *in Other Decisions*

In *United States v. Ferger*, 250 U.S. 199 (1919), this Court upheld the constitutionality of the Federal Bill of Lading Act in a case where defendant obtained a bank loan by pledging forged bills of lading. In sustaining the power of Congress to regulate bills of lading in interstate commerce, this Court concluded as self-evident that documents of title play a critical role in our economy by providing financing in an enormous number of transactions in domestic and foreign commerce:

> [A]s instrumentalities of interstate commerce, bills of lading are the efficient means of credit resorted to for the purpose of securing and fructifying the flow of a vast volume of interstate commerce upon which the commercial intercourse of the country, both domestic and foreign, largely depends, is a matter of common knowledge as to the course of business of which we may take judicial notice. Indeed, that such bills of lading and the faith and credit given to their genuineness and the value they represent are the producing and sustaining causes of the enormous number of transactions in domestic and

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[12] Every state has adopted provisions of the Uniform Commercial Code, which, like the Federal Bill of Lading Act, recognize the right of a bank issuing a letter of credit to rely on bills of lading as collateral. *See, e.g.*, U.C.C. §§ 1-202, 7-501, 7-502, 9-304, 9-305. The decision abrogates these U.C.C. provisions as well.

> foreign exchange is also so certain and well known that we may notice it without proof.

250 U.S. at 204-05. The decision below is totally inconsistent with this Court's conclusion that documents of title are the centerpiece instruments in financing commerce on which our economy largely depends.

The decision below also conflicts with the principles stated by this Court in *Decatur Bank v. St. Louis Bank*, 88 U.S. (21 Wall.) 294 (1875). There, a bank issued a letter of credit for its customer and relied on the bills of lading and the goods as collateral in the transaction. This Court declared:

> The [beneficiary] to which this letter [of credit] was addressed doubtless thought [the issuing bank] trusted in some degree to the pecuniary responsibility of [the customer], but it had no right to suppose that the letter of credit was given solely on this account. *On the contrary, the letter is based on the idea that shipments of stock would protect the drafts. If [the customer] was responsible, still the [issuing] bank did not trust to this alone, but relied on the security which was to accompany the drafts. This it had a right to do, and its conduct was very natural under the circumstances.*

Id. at 299 (brackets and emphasis added).

This Court has consistently recognized that banks may rely on bills of lading as collateral to finance their customers' purchases of goods. *Means v. Bank of Randall*, 146 U.S. 620 (1892); *North Pa. R.R. Co. v. Commercial Bank of Chicago*, 123 U.S. 727 (1887); *National Bank v. City Bank*, 103 U.S. 668 (1880). This well-settled principle applies with even greater force to documents of title presented under commercial letters of credit, the predominant payment and financing mechanism in world trade. *See* W. Hawkland, *Uniform Commercial Code Series* § 5-101:02 (1990) ("Letters of credit . . . continue to be highly important in international business transactions all over the world, financing thousands of transactions worth billions of dollars every day.") (footnote omitted).

C. The Decision Below Conflicts with the Principles Stated in Decisions of Other Circuit Courts

The holding that documents of title are unworthy of bank reliance conflicts with the principles stated in decisions of the Second and Fifth Circuits. In *Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841 (2d Cir. 1985), *cert. denied*, 476 U.S. 1188 (1986), the Second Circuit observed:

> [A] negotiable or order bill of lading is a fundamental and vital pillar of international trade and commerce, indispensable to the conduct and financing of business involving the sale and transportation of goods between parties located at a distance from one another.... The necessity of maintaining the integrity of and confidence in bills of lading has been recognized by us in a line of cases beginning before and continuing after the 1936 enactment of COGSA.

779 F.2d at 845. Similarly, in *Morrison Grain Co. v. Utica Mutual Ins. Co.*, 632 F.2d 424 (5th Cir. 1980), the Fifth Circuit stated:

> The importance of the bill of lading as a commercial document is evident. Ocean bills of lading have been treated as negotiable instruments for well over a hundred years. They have been accorded the status of full negotiability under Federal law in both the Federal Bills of Lading Act (1916), popularly called the Pomererene [*sic*] Act, and the Carriage of Goods by Sea Act (1936). As negotiable instruments, ocean bills of lading are regularly relied upon by sellers, buyers and banks in the negotiations of transactions throughout the globe, and the record indicates they were so relied upon in this case. Their reliability is further assured in that the ocean carrier, by issuing a clean bill of lading, binds itself and is

only discharged upon actual delivery of the goods to the holder of the bill.

632 F.2d at 432-33 (citations and footnotes omitted). *See also West India Indus. v. Tradex, Tradex Petroleum Services*, 664 F.2d 946, 949 (5th Cir. 1981) (ocean bill of lading is one of the indispensable instruments in financing movement of goods throughout the world).

D. The Decision Below Severely Impairs Commerce

Commerce depends on the willingness of banks to provide financing for the purchase of goods. Secured letter of credit financing, which has been extant for more than a century in the United States, is a major source of such financing.[13] Congress has encouraged banks to rely on bills of lading as collateral, as have decisions of this Court and other circuit courts of appeal. If the decision below remains the law, banks will be reluctant to provide such financing for fear of engaging in unreasonable banking practices. Commerce will be deprived of an indispensable source of trade financing and will inevitably suffer.[14]

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[13] *See supra* n.6. Scholars have traced letter of credit financing as far back as the twelfth century. *See* Verkuil, *Bank Solvency and Guaranty Letters of Credit*, 25 Stan.L.Rev. 716 n.1 (1973). The decision below cited Verkuil to support its conclusion that commercial letter of credit transactions are unsecured lending, but Verkuil directly contradicts that view:

> It is thus one of the important features of the traditional letter of credit that when the bank pays it has in its hands security in the form of title to the goods. . . . But in all events the bank's letter of credit issued for its customer is, in function, a secured loan, and the bank's lending risks should be measured in light of that fact.

Id. at 721.

[14] Republic is located in Miami, Florida, which is a principal banking center in the United States for international trade. Banks in Alabama and Georgia — also coastal states within the Eleventh Circuit that conduct international trade — will also be directly affected by the decision below.

The decision will also impair the viability of trust receipt financing. In such financing, the customer pledges to the bank the documents of title presented by the beneficiary. To facilitate the customer's ability to resell the goods, the bank agrees to deliver the documents of title to the customer in exchange for a trust receipt. The trust receipt constitutes the customer's agreement that any proceeds received from an interim sale of the goods will be held in trust for the bank. The efficacy of such financing is that the customer can resell the goods without impairing the bank's collateral position. *See Societe Generale v. Federal Ins. Co.*, 856 F.2d 461, 462 (2d Cir. 1988) (describing trust receipt financing involving Duque); *United States v. Castro*, 829 F.2d 1038, 1042 (11th Cir. 1987) (same), *modified in part*, 837 F.2d 441 (11th Cir. 1988); H. Harfield, *supra*, Ch. 5.

Trust receipt financing has been recognized in the United States for at least a century. *See, e.g., Commercial Nat'l Bank of New Orleans v. Canal-Louisiana Bank & Trust Co.*, 239 U.S. 520 (1916). The decision below declares the very premise of such financing — bank reliance on the documents of title and the goods as collateral — unreasonable as a matter of law, which will undoubtedly impair this established method of financing as well.

The decision also severely hampers the $75 billion market for bankers' acceptances. In commercial letter of credit transactions, the seller often agrees to present a draft payable over time. If the beneficiary's presentation complies with the terms of the letter of credit, the bank will accept the draft, which will be payable on the date specified therein. Attached to the draft are the documents of title. Once accepted by the bank, the draft becomes known as a "bankers' acceptance." *See* H. Harfield, *supra*, Ch. 7 at 88.

There is a well established market in the United States for bankers' acceptances, which are negotiable instruments bought and sold among banks and in the private sector. *Id.* at 91. Bankers' acceptances are deemed secured instruments since the documents of title accompany the acceptances. Outstanding bankers' acceptances exceed $75 billion in the

United States. As letter of credit commentators, who have decried the decision below, recently observed: "[T]he $75 billion - plus bankers' acceptance market would indeed be shaken to its roots if Judge Tjoflat's thesis is correct. In point of fact, it is not." *See* Byrne, *Update Docket,* LC Update 19 (July 1990).

Commercial letters of credit are "used to finance millions and millions of dollars of goods in international commerce every day of the year." Funk, *Letters of Credit: UCC Article 5 and Uniform Customs and Practice,* 82 Banking L.J. 1035, 1037 (1965). There is nothing inherently evil or untrustworthy about such transactions. To the contrary, commercial letters of credit are the principal method of conducting and financing world trade. This Court should grant certiorari to remedy the unsound decision of the court below.

III. THE BANKERS BLANKET BOND COVERS FORGED DOCUMENTS OF TITLE PRESENTED UNDER LETTERS OF CREDIT

Although banks clearly are entitled to rely on documents of title to finance the purchase of goods through commercial letters of credit, there does exist the possibility that the bills of lading could be forged. But the answer to eliminating forgery risk is not to declare an indispensable method of financing unreasonable as a matter of law. Rather, the answer is to insure the risk. That is precisely what Republic did by purchasing Clause (E) coverage in the bankers blanket bond.[15]

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[15] The majority decision's reliance on Republic's negligence in the transaction to defeat Clause (E) bond coverage directly conflicts with the Fifth Circuit's decision in *First Nat'l Bank of Fort Walton Beach v. United States Fidelity and Guar. Co.,* 416 F.2d 52 (5th Cir. 1969) (interpreting Clause (E), negligence of the bank is *not* a defense under the bankers blanket bond).

Clause (E) of the bond provides coverage for:

> Loss resulting directly from the [bank's] having, in good faith, ... acquired, sold, or delivered, or given value, extended credit or assumed liability, on the faith of, or otherwise acted upon, any original ... [forged] Document of Title [defined to include a bill of lading].

A-12-13 (brackets added). The majority held that this language does not protect a bank that relies on forged bills of lading in financing the purchase of goods under a commercial letter of credit. By depriving banks of this insurance protection, the decision below threatens the viability of such financing and banks' willingness to provide it.[16]

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[16] The conclusion of non-coverage cannot be justified. The majority erroneously concluded that Republic suffered the loss when it issued the letter of credit. But the issuance of a commercial letter of credit is *not* an unconditional obligation. The issuer's duty to pay is wholly contingent on its receipt of facially conforming bills of lading. Republic was not irrevocably committed to doing anything until it received conforming bills of lading, its collateral in the transaction. As the dissent and the trial judge recognized, the loss resulted from the *honoring* of the letter of credit, which occurred *after* the forged bills of lading were delivered to and examined by Republic. *See Hamilton Bank v. Insurance Co. of N. Am.*, 557 A.2d 747 (Pa. Super. Ct. 1989) ("In order to recover under the provisions of the bond, we find that Bank would have needed to extend credit in reliance on original bills of lading (not mere photocopies) which should have been in the Bank's actual physical possession *prior to release of the funds.*") *Id.* at 751 (emphasis added).

The majority also ignored that under a commercial letter of credit, the bank "acquires" and "gives value" on the bills of lading when it pays the beneficiary's draft, 49 U.S.C. § 111, "extends credit," *i.e.* loans money, to its customer only when it pays the draft, *Verkuil, supra*, 25 Stan.L.Rev. 716 at 723, "assumes liability" to the beneficiary only after presentation of facially conforming bills of lading, U.C.C. § 5-114(1), and "otherwise acts upon" forged bills of lading by paying the beneficiary's draft and retaining the bills of lading as collateral, *cf. Richardson Nat'l Bank v. Reliance Ins. Co.*, 491 F. Supp. 121, 124 (N.D. Tex. 1977), *aff'd*, 619 F.2d 557 (5th Cir. 1980). All of these events of coverage occurred *after* Republic had possession of and examined the original bills of lading. *See French Am. Banking Corp. v. Flota Mercante Grancolombiana, S.A.*, 609 F. Supp. 1352, 1358 (S.D.N.Y. 1985) (Clause (E) language covered

This unprecedented interpretation of Clause (E) will have a substantial adverse effect on the banking industry, as the decision could lead to millions of dollars in uninsured and uninsurable losses. Virtually every bank carries a bankers blanket bond which is standard throughout the industry. *Hamilton Bank v. Insurance Co. of N. Am.*, 557 A.2d 747, 749 n.2 (Pa. Super. Ct. 1989). Clause (E) of the bond is designed to protect banks from losses resulting from acting upon, in any of seven different ways, forged, altered or counterfeit documents on which banks rely every day in transacting business.[17] Clause (E) also provides that the bank must have the original instrument before it can claim reliance upon it:

> Actual physical possession of the [covered document] by the [bank], its correspondent bank or other authorized representative, is a condition precedent to the [bank's] having relied on the faith of, or otherwise acted upon, such items.

A-12-13 (brackets added).

In standard banking practice, a bank almost always first makes a credit decision to loan money, then agrees to loan the money and then makes the loan. A bank receives the instruments covered by the bond when its funds are advanced, not when it agrees to make the loan. A bank would never have an executed promissory note or mortgage at the time its loan committee approved the loan. Nor would the bank have the required loan documents when it agrees to make a loan conditioned upon its receipt of the documents.

Yet, the majority decision held the bank must have the original covered instrument when it makes the credit deci-

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bank which advanced funds to Colombian Coffee Company and Duque after receiving forged bills of lading from Colombian as collateral; bank's good faith question of fact for trial); *American Ins. Co. v. First Nat'l Bank in St. Louis*, 409 F.2d 1387 (8th Cir. 1969) (Clause (E) covered bank which advanced funds after receipt of forged shipper's copy of bill of lading accepted as collateral).

[17] Clause (E) lists the following covered documents: securities, *documents of title*, deeds, mortgages, certificates of origin, certificates of title, evidence(s) of debt, guaranties, and security agreements. A-12-13. (emphasis added).

sion or enters into an agreement to loan money contingent upon its receipt of the loan instruments. The court inexplicably concluded that Clause (E) does not cover a bank even if it receives and relies upon the forged original document prior to advancing the funds. As Judge Brown observed in dissent:

> Since the court's declaration would eliminate coverage for, say, a forged corporate guarantee, this is almost like saying to a bank paying substantial premiums for supposed coverage, "thanks so much, but you have bought a pig in a poke." *See* (E)(1)(f)(i).

A-18. The interpretation of the bankers blanket bond by the majority should not be the law in the Eleventh Circuit.[18]

CONCLUSION

This Court should grant the petition for writ of certiorari, vacate the judgment below, and reinstate the judgment of the district court.

Respectfully submitted,

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[18] The Eleventh Circuit's construction of Clause (E) cannot be cured by rewriting the bond since the court below held that banks act unreasonably, as a matter of law, where they rely on documents of title as collateral. It is hard to conceive of a policy provision which could insure a bank where it engages in a banking practice which an appellate court has held unreasonable as a matter of law.